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CONTROL OF PROPERTY BY THE DEAD.

Although in spite of us death is our inevitable goal, most of us feel a strong desire to continue to exert an influence on the affairs of the world we leave behind. We want to keep alive the race, the family, the name, through the years to come. We do not want to be forgotten. We do not want to be like a finger thrust into a bowl of water, which, when the finger is withdrawn, soon shows a surface as unruffled as before the finger touched it.

We have, not as frequently perhaps, but very commonly, a similar feeling about our property. Our goods, if we are so fortunate as to have any, are not interred with our bones, but are left behind for others to enjoy.¹ But we like to determine who shall enjoy them and how they shall be enjoyed. Shall we not do as we wish with our own?

But this world with its good, or at least its material, things is a world for the living and not for the dead. It would not be the part of wisdom to allow the living, in their enjoyment of property, to be unduly trammelled by the wishes of the dead. To allow to the owner of property the greatest power of directing its disposition on his death and after his death is not in truth the highest ideal of civilized society. The welfare of society demands that the law should set limits to the power of the hand of the dead to control human affairs.

If the owner of property dies intestate the law in all civilized countries allows the property, or at least as much of it as the state does not itself take, to pass to certain persons connected with the owner by blood, marriage, or adoption. Naturally the laws of different countries differ as to who those relatives shall be.² Under the feudal system, in which the military and in large part the political establishment was based upon tenure

¹ Here our practice differs from that of primitive societies, like those of the Fiji Islanders and the aboriginal Australians. Letourneau, *Property, Its Origin and Development*, 319-320.

² See Maine, *Early Law and Custom*, Chap. 4. For the law of inheritance among various primitive peoples, see Letourneau, *Property, Its Origin and Development*, Chap. XVIII.

of land, the eldest son of the decedent was preferred to his other children, and sons took precedence over daughters.³ In England, where the feudal system struck its deepest roots,⁴ where the government continued for so long a time and so largely in the hands of a landed aristocracy, and where the law as to land is peculiarly conservative, the law of primogeniture still persists.⁵ In several of the American colonies primogeniture prevailed prior to the Revolution; in several, the eldest son was given a double portion. But within a short time after the Revolution these rules had given way to the principle of equal distribution,⁶ which already prevailed in England in the case of chattels.⁷

THE TESTAMENTARY POWER.

But the law in England and in this country, as in all civilized countries, goes further than merely to allow the relatives of the decedent to succeed to his property. It permits the owner of property before his death to designate the recipients of his property, or at least of a part of it. We are so accustomed to the right of testamentary disposition that we seldom pause to consider what an extraordinary power it confers upon the owner of property. "The power of free testamentary disposition," says Sir Henry Maine,⁸ "implies the greatest latitude ever given in the history of the world to the volition or caprice of the individual."⁹ But the right of testamentary disposition is never absolute. All systems of law place some restrictions upon the volition and caprice of the individual, some limitations upon the

³ On the history and function of the law of primogeniture, see Pollock & Maitland, *History of English Law* (2d Ed.), II, 260-313; Maine, *Ancient Law*, 227-243.

⁴ Pollock & Maitland, *History of English Law* (2d Ed.), II, 265.

⁵ See the *Inheritance Act* (1833), 3 & 4 Will. IV, c. 106; *Land Transfer Act* (1897), 60 & 61 Vict., c. 65.

⁶ Kent, *Commentaries*, 375.

⁷ *Statutes of Distributions*, 22 & 23 Car. II, c. 10 (1671), and 1 Jac. II, c. 17 (1685). For the law as to intestate succession prior to those statutes, see Pollock & Maitland, *History of English Law* (2d Ed.), II, 356-363.

⁸ *Village Communities*, p. 42.

⁹ For an account of the origin of the right of testamentary disposition, see Maine, *Ancient Law*, Chaps. VI, VII.

power of the owner of property to determine who shall enjoy it and to control the disposition and use of it after he is dead.

SELECTION OF BENEFICIARIES.

The history of English testamentary law shows a constantly expanding power of testamentary disposition. At common law freehold estates in land could not be disposed of by will.¹⁰ But the desire of the holder of property to control its disposition on his death would not be denied. He would transfer his estate to others to hold to his use, and the use or beneficial interest so created could be devised; or he might transfer to others to hold to uses to be declared by his will. When the Statute of Uses¹¹ turned uses into legal titles, the Statute of Wills was soon passed, empowering a tenant in fee simple to devise his estate "at his free will and pleasure."¹² Although the Statute of Wills enabled a tenant in fee simple to disinherit his heir, yet if he left a widow he could not prevent her from claiming her dower in all land of which he was seised at any time during coverture. But this restraint, it was held, could be evaded if the testator had had the foresight to take an equitable instead of a legal estate.¹³ The claim of the widow to dower in equitable estates is now allowed in England by statute.¹⁴ But this statute allows the husband by deed or by will to deprive her of her dower in both legal and equitable estates. A husband's claim to courtesy in equitable as well as legal estates was recognized without the aid of any statute; but in England today a married woman may by disposing of her land by deed or by will bar her husband's right

¹⁰Leake, *Property in Land* (2d Ed.), 48. Conveyances of land *inter vivos* were allowed in 1285 by the Statute *Quia Emptores*, 18 Ed. I, st. 1, c. 1.

¹¹ 27 Hen. VIII, c. 10 (1535).

¹² 32 Hen. VIII, c. 1 (1540). But it would seem that after the enactment of the Statute of Uses and before the enactment of the Statute of Wills the tenant could practically devise his estate by a feoffment to the use of such person as he should by will appoint. See Bacon, *Reading on the Statute of Uses*, Rowe's Ed., n. 80.

¹³ *Bottomley v. Lord Fairfax*, Prec. Ch. 336; Ames, *Cases on Trusts* (2d Ed.), 375.

¹⁴ *Dower Act* (1833), 3 & 4 Will. IV, c. 105.

of courtesy.¹⁵ As to chattels, it was the law in England in early times that the wife and children of the owner had claims to their "reasonable parts" which could not be defeated by testamentary disposition. If there were no children, the widow was entitled to a half; if there were children, she was entitled to a third and they to another third. But these restrictions on the power of testamentary disposition of chattels disappeared very generally in England early in the fourteenth century.¹⁶ The English law today allows the owner of real or personal property to dispose of it on his death without any regard to the welfare of his wife or children; it gives a testator greater freedom in this respect than does any other civilized country.¹⁷

In the United States the surviving wife or husband is given some kind of interest in the estate which cannot be defeated by will. In many of the states the common law rights of dower and courtesy still persist. And there are generally, though not universally¹⁸ statutes which give the widow an interest in her husband's equitable estates in land.¹⁹ In some of the states the right of the surviving spouse in land is considerably larger than

¹⁵ Married Women's Property Act (1882), 45 & 46 Vict., c. 75.

¹⁶ Pollock & Maitland, History of English Law (2d Ed.), II, 348-356; Holdsworth, History of English Law, III, 436. In some parts of England the restrictions lasted much longer.

¹⁷ See Sohm, Institutes of Roman Law, Ledlie's trans., Sec. 113; Civil Code of Argentina, Arts. 3591 *ff*; Belgian Civil Code, Arts. 913 *ff*; French Civil Code, Arts. 913-916; German Code, Art. 2303; Italian Civil Code, Arts. 805 *ff*; Civil Code of Japan, Arts. 1130 *ff*; Spanish Civil Code, Arts. 806 *ff*; Swiss Civil Code, Secs. 470-480; Bell, Principles of the Law of Scotland, Bk. III, Part I, c. 1; Tyabji, Principles of Muhammadan Law, Sec. 579. In South Africa and Quebec the restrictions derived from the Roman law have yielded to the English principle of freedom of testamentary disposition. Nathan, Common Law of South Africa, Sec. 1811; Juta, Law of Wills in South Africa, I; Stat. 14, Geo. III, c. 83, Sec. 10 (1774); Laws Lower Canada, 41 Geo. III, c. 4 (1801).

¹⁸ See Seaman v. Harmon, 192 Mass. 5, 7.

¹⁹ I Stimson, Amer. Stat. Law, Sec. 3212. In some of the states she has an interest in equitable estates only when the husband was beneficially entitled on his death. See for example, Rev. Stat. Neb. (1913), Sec. 1265; Ohio Gen. Code (1910), Sec. 8606; Code of Tenn. (1896), Sec. 4139. In others she has an interest when he was beneficially entitled at any time during coverture. See for example, Hurd's Rev. Stat. Ill. (1915-1916), c. 41, Sec. 1; Gen. Stat. Kan. (1909), Sec. 2942; Rev. Stat. Mo. (1909), Sec. 345; 2 Comp. Stat. N. J. (1910), p. 2043; Gen. Laws R. I. (1909), p. 1195; Comp. Laws Utah (1907), Sec. 2826.

the common law right of dower or courtesy;²⁰ and in some the surviving spouse has an indefeasible right to a share of personal as well as of real property.²¹ Children and other relatives are generally given little if any protection. In Louisiana, it is true, the children and the parents of the testator are given the ample protection afforded by the civil law.²² In Texas at one time a parent was forbidden to deprive his children of more than one-fourth of his estate; but this restriction was subsequently removed.²³ In some states statutes give the minor children of the decedent, as well as his widow, a right in the homestead which cannot be defeated by his will.²⁴ In some states there are statutes which provide for an allowance for the temporary support of the widow and of the minor children of the testator which cannot be defeated by him.²⁵ There are quite generally statutes which allow a testator's children who are not provided for in his will to receive the shares which they would receive if he died intestate, unless an intention to exclude them is affirmatively shown by the will or in some states by other evidence; in some states posthumous children, and in others any child born after the execution of the will cannot be entirely excluded.²⁶ In the United States, therefore, a small measure of protection is given to the children of the testator, and a considerably larger protec-

²⁰ See for example, Code Iowa (1897), Sec. 3366; Gen. Stat. Minn. (1913), Sec. 7238; Rev. Stat. Neb. (1913); Sec. 1265; Comp. Laws Utah (1907), Secs. 2731, 2826.

²¹ See for example, Hurd's Rev. Stat. Ill. (1915-1916), c. 41, Sec. 12; Gen. Stat. Kan. (1909), Secs. 9811-9812; Mass. R. L. (1902), c. 135, Sec. 16; Gen. Stat. Minn. (1913), Sec. 7243; Rev. Stat. Mo. (1909), Secs. 349-353; Ohio Gen. Code (1910), Sec. 10,566. In states in which the institution of community ownership is recognized, one spouse cannot dispose of more than his or her own share of community property.

²² Civ. Code La., Art. 1493.

²³ See Paschal v. Acklin, 27 Tex. 173.

²⁴ See for example, Gen. Stat. Kan. (1909), Secs. 2935-2940; Gen. Stat. Minn. (1913), Sec. 7237; Civil Code N. D., Sec. 5627; Ohio Gen. Code (1910), Sec. 11,732.

²⁵ See Code Iowa (1897), Sec. 3314; Gen. Stat. Minn. (1913), Sec. 7243; Rev. Stat. Neb. (1913), Sec. 1267; New Mex. Stat. (1915), Sec. 5893; Ohio Gen. Code (1910), Sec. 10,656. See also Cal. Code Civ. Proc., Secs. 1465-1469.

²⁶ See a full collection of the statutes in Warren, Cases on Wills and Administration, 284-285.

tion to his widow. Doubtless, the reason why in the United States it has been found necessary to give a greater protection to the widow and children than that which is given in England today is that in England marriage settlements are common, at least among the well-to-do (and the English law of property is and always has been chiefly concerned with the upper and upper middle classes) and afford the necessary protection; but in the United States such settlements are not common. But even in the United States there is a far greater freedom of testamentary disposition than in most of the countries of the world.

There are, however, certain classes of persons who find it peculiarly easy to insinuate themselves into the good graces of a testator or to play upon his fears, and to secure perhaps a share, perhaps the whole of his estate; so that it has sometimes been felt necessary for the law to intervene for the protection of his wife and children and other relatives, and to impose limitations on his testamentary power. This has happened chiefly in the case of the objects (and results) of the testator's illicit affections, and of the objects of his charitable zeal.

In South Carolina a man cannot devise or bequeath to his mistress and bastard children more than one-fourth of his estate.²⁷ This restriction cannot be successfully evaded by the creation of a secret trust.²⁸ So also, in Louisiana, it is provided that those who have lived together in open concubinage and who do not afterwards marry are incapable of making to each other, whether *inter vivos* or *mortis causa*, any donation of immovables; and if they make a donation of movables, it cannot exceed one-tenth of the whole value of their estate.²⁹ There is a provision also forbidding donations to illegitimate children beyond what is necessary to procure them sustenance or an occupation or profession, if the donor or testator or testatrix leaves legitimate children or descendants.³⁰ But in England and in most

²⁷ Code S. C. (1912), Sec. 3575. There is a similar provision as to transfers *inter vivos*. Code S. C. (1912), Sec. 3454.

²⁸ Gore v. Clark, 37 S. C. 537.

²⁹ Civ. Code La., Art. 1481.

³⁰ Civ. Code La., Art. 1483.

of the states a man may, if it pleases him, leave all the property over which he has the power of testamentary disposition to his mistress and illegitimate children; and it is generally held that although the illicit relationship may be shown as evidence of undue influence or even of lack of testamentary capacity, it does not raise a presumption of undue influence or lack of testamentary capacity; much less does it make the disposition illegal.³¹

Again, there are restrictions on the power of devising or bequeathing property for charitable purposes. To many persons the idea of a generosity which involves no personal sacrifice is irresistibly appealing. "Defer not charities till death," said Bacon, who himself bequeathed his property to found lectureships in the universities, but who died insolvent,³² "for, certainly, if a man weigh it rightly, he that doth so is rather liberal of another man's than of his own."³³ In order to restrain the undue diversion of heirs and disappointment of expectant relatives and friends,^{33a} and to restrain the taking of lands out of commerce, and perhaps in particular to curb the church,³⁴ the law has imposed limitations upon the power of disposing of property for charitable purposes by will or by a conveyance executed shortly before death. The Statute of Mortmain,³⁵ or as it may perhaps more properly be called, the Charitable Uses Act,³⁶ provided that no land or property to be laid out in land should be given to charitable uses by will; and it also forbade gifts *inter vivos* for charitable purposes unless made by deed executed at least twelve months and enrolled in chancery at least six months before the death of the donor. But the act met with much criticism;³⁷ and

³¹ Arnault v. Arnault, 52 N. J. Eq. 801. But of course juries are much more apt to find undue influence or want of testamentary capacity in the case of an "unnatural" than in the case of a "natural" disposition. As a practical matter this affords a real, though extra-legal, restraint on the caprice of testators.

³² Campbell, Lives of the Lord Chancellors, II, 421, 439.

³³ Bacon's Works, VI, 462. See Hobhouse, The Dead Hand, preface, xii.

^{33a} See Jeffries v. Alexander, 8 H. L. C. 594, 646-7.

³⁴ Bristowe, Mortmain and Charitable Uses Act (1891), 3-6.

³⁵ 9 Geo. II, c. 36 (1736).

³⁶ See Luckraft v. Pridham, 6 Ch. D. 205, 214.

³⁷ Bristowe, Mortmain and Charitable Uses Act (1891), 17-18.

by the present English law³⁸ land may be devised for charitable purposes, but the land must be sold within a year after the testator's death unless the court or the charity commissioners authorize its retention, when it is required for the actual occupation of the charity. Thus in England today there is no longer a restriction on the power of the testator to exclude his heir in favor of a charity.

The Charitable Uses Act did not apply to the American colonies. A similar provincial statute of the province of Massachusetts Bay was repealed immediately after the American Revolution.³⁹ In some of the states there are, however, statutes limiting the power of making a testamentary disposition for charitable purposes. These statutes make no distinction between land and personalty, and their purpose is the protection of heirs and not the prevention of the taking of property out of commerce. Thus it is provided in some states that no devise or bequest for a charitable purpose shall be good unless the will is executed within a certain time before the death of the testator.⁴⁰ In some states there are statutes which limit the amount which can be devised or bequeathed for charitable purposes.⁴¹

³⁸ Mortmain and Charitable Uses Act (1891), 54 & 55 Vict., c. 73, Sec. 5.

³⁹ Odell v. Odell, 10 Allen (Mass.) 1.

⁴⁰ Cal. Civ. Code (1915), Sec. 1313 (30 days); Park, Ann. Code Ga. (1914), Sec. 385 (90 days); Revised Code Mont. (1907), Secs. 4761-4762 (30 days); Ohio Gen. Code (1910), Sec. 10,504 (one year if testator leaves issue or adopted child); Purdon's Dig. Pa. (13th Ed.), p. 5129 (one month, applying also to transfers *inter vivos*). See Stat. 7 & 8 Vict., c. 97, Sec. 16 (Ireland). A similar statutory provision in New York has been repealed. N. Y. Laws (1911), c. 857. These statutes impose limitations on the right of the testator to devise or bequeath, and only his heir or next of kin or widow can take advantage of them. Trustees of State University v. Folsom, 56 Ohio St. 701.

⁴¹ Cal. Civ. Code (1915), Sec. 1313 (one-third if testator leaves legal heirs); Park, Ann. Code Ga. (1914), Sec. 385 (one-third if testator leaves wife or descendant); Iowa Code (1897), Sec. 3270 (one-fourth if testator leaves spouse, child or parent); Revised Code Mont. (1907), Sec. 4761 (one-third if testator leaves legal heirs); N. Y. Consol. Laws (1909), Decedent Estate Law, Sec. 17 (one-half if testator leaves spouse, child or parent). These statutes impose limitations on the right of the testator to devise or bequeath and not on the right of the devisee or legatee to take. Hence they have no applicability to bequests by a resident of a state which has no such statute to a charitable corporation of a state which has such a statute. Healy v. Reed, 153/Mass. 197.

Except for such restrictions as these and such restrictions as may be imposed upon the capacity of the devisee or legatee to take or hold property, as in the case of corporations, aliens, monks, as to which, however, the restrictions have been largely though not entirely removed, the testator is free to leave his property to any one he may choose. The undeserving, the unworthy character of the person selected is immaterial. The testator's choice may be whimsical, it may be unjust, it may be unnatural, but it will be effective, provided the disposition was not induced by fraud or undue influence or other wrongful means and provided the testator did not lack testamentary capacity.⁴² It is felt that it would be unwise to attempt to limit the power of the owner to select the objects of his bounty, and that it would be a hopeless task to determine in each instance whether the testator had acted wisely or foolishly in his choice of beneficiaries.⁴³

NATURE OF DISPOSITION.

The testator's caprice or whim is given wide scope in which to operate, not only in respect to the selection of the objects of his bounty, but also in respect to the nature of the disposition of his property. In order to accomplish his purposes he may employ the device of a condition, precedent or subsequent, or a conditional limitation; or he may employ the device of a trust or power.

A. *Conditions and conditional limitations.* A testator may give a legal or equitable estate or interest to continue until the happening of a certain event; or he may provide that on the happening of such an event the estate or interest of the devisee or legatee shall cease, and the property or the beneficial interest in the property shall pass to the testator's heir or next of kin or shall go over to some other person.⁴⁴ Now eccentric testators have

⁴² See *Breadheft v. Cleveland*, 110 N. E. 662 (Ind. 1915); *Meier v. Buchter*, 197 Mo. 68; *Arnault v. Arnault*, 52 N. J. Eq. 801.

⁴³ As a practical matter, of course, a restraint is imposed by the readiness of jurors to find undue influence or lack of testamentary capacity where the disposition is foolish.

⁴⁴ Professor Gray was of the opinion that determinable fees are ren-

chosen all sorts of peculiar events as those on the happening of which the legal or equitable interest in property left by them is to change hands. The comic opera uncle, with his plot-producing bequests, is not unknown either in England or in this country. The mere fact, however, that the event is capriciously selected does not invalidate the disposition. The law does not forbid capricious or whimsical conditions or limitations or trusts, provided the testator does not cross that somewhat indistinct line which separates dispositions which are illegal or immoral or contrary to public policy from those which are merely foolish or absurd.

The decision in an early New York case⁴⁵ is interesting in this connection. The testator devised his interest in a piece of wood-land to all his children "in case the same continue to inhabit the town of Hurley, otherwise not." One of the devisees never resided within the town, but it was held that he took an interest in the property which on his death passed to his heirs. The court, in speaking of the condition, said:

"It is too absurd and unreasonable to be countenanced. It is absurd for any man to compel all his children to live in a small country village, as the condition of enjoying a piece of wood-land lying there. A thousand better situations might offer for obtaining a livelihood, or being useful to the public, and when from caprice, or any other motive, choice in this respect, which ought to be free, is denied them, courts ought not to be very solicitous to enforce a direction, which, to say the least of it, betrays more of a whimsical disposition in the testator, than of that sound sense and understanding which he professes to have enjoyed when he made his will."⁴⁶

But the cases generally do not go as far as this. Conditions as to residence in a particular place or house, if sufficiently defi-

dered invalid by the Statute *Quia Emptores*, but the cases have generally held otherwise. Gray, Rule against Perpetuities (3d Ed.), Secs. 31-41a. Certainly that statute does not prevent the attaching of a condition subsequent to a fee simple (*Op. cit.*, Sec. 30), and of course that statute has no application to conditional limitations (*Op. cit.*, Sec. 32), nor to equitable interests.

⁴⁵ *Newkerk v. Newkerk*, 2 Caines (N. Y.), 345.

⁴⁶ The court was also of the opinion that the condition was void for uncertainty; and that there was no one who could take on the breach of the condition, as the devisees were also heirs and there was no gift over except of the residue. On the matter of provisions *in terrorem*, see Wheeler v. Bingham, 3 Atk. 364; 6 Gray, Cases on Property (2d Ed.), 32, 33.

nite, are upheld.⁴⁷ So also the courts have upheld conditions as to change of name,⁴⁸ and conditions as to the pursuit of certain studies,⁴⁹ or the following of a certain trade or profession,⁵⁰ and conditions as to abstinence from the use of liquor or tobacco or from card-playing.⁵¹ So also a testator may attach to a legacy a condition that the legatee should build or repair a monument.⁵² He may make a bequest to a church conditional upon the minister's wearing a black gown in the pulpit,⁵³ or upon the continuance of its present pastor in office for a certain time.⁵⁴ Although conditions like these may be arbitrary, or even foolish, they are not contrary to any public policy.

B. *Trusts and powers.* For the accomplishment of his purpose a testator may wish to employ the device of a trust instead of a condition or conditional limitation. Here, however, he is met with a difficulty. A valid trust cannot be created

⁴⁷ Dunne v. Dunne, 3 Sm. & Gif. 22 (devise of land with a condition that devisees should reside in the mansion house on the land); Clavering v. Ellison, 7 H. L. C. 707 (gift over if devisee should be educated abroad); *In re Crumpe* (1912), 1 I. R. 485 (bequest of annuity to cease if annuitant should return to Ireland, England or Scotland); Lowe v. Cloud, 45 Ga. 481 (land devised provided the devisee "come and live on it"); Conger v. Lowe, 124 Ind. 368 (gift of land to one for life "provided he will live on and occupy same"); Pearl v. Lockwood, 123 Mich. 142 (legacy to nephew "if he continue to live with my family and on my estate until he shall arrive at the age of 21 years and labor as faithfully as he has labored for me"). As to the effect of the Settled Land Act (1882), see *In re Paget's Settled Estates*, 30 Ch. D. 161. See also Jarman, Wills (6th Ed.), pp. 1546-1548; and the cases cited in a note to Casper v. Walker, 33 N. J. Eq. 35.

⁴⁸ Davies v. Lowndes, 2 Scott, 71; Smith v. Smith, 64 Neb. 563; Merrill v. Wisconsin Female College, 74 Wis. 415 (change of name of college). See *In re Jackson's Will*, 20 N. Y. Supp. 380 (legacy to Thaddeus J. Boyd, "provided he will write his name in all future time, T. Jackson Boyd"). Compare Musgrave v. Brooke, 26 Ch. D. 792; Taylor v. Mason, 9 Wheat. (U. S.) 325. See Jarman, Wills (6th Ed.), pp. 1542-1546, as to "name and arms" clause.

⁴⁹ Shepard v. Shepard, 57 Conn. 24.

⁵⁰ Webster v. Morris, 66 Wis. 366.

⁵¹ Markham v. Hufford, 123 Mich. 505; Hawke v. Euyart, 30 Neb. 149; Dustan v. Dustan, 1 Paige (N. Y.) 509; Onderdonk v. Onderdonk, 127 N. Y. 106; Cushman v. Cushman, 116 N. Y. App. Div. 763, affirmed 191 N. Y. 505; Webster v. Morris, 66 Wis. 366; Jordan v. Dunn, 13 Ont. 267. Sometimes the condition fails for uncertainty. Jones v. Jones, 223 Mo. 424.

⁵² See *In re Tyler* (1891), 3 Ch. 252.

⁵³ *In re Robinson* (1892), 1 Ch. 95.

⁵⁴ Caw v. Robertson, 5 N. Y. 125.

unless there is some one to enforce it. A charitable trust can be enforced by the attorney-general. But a trust for a non-charitable purpose can be enforced only by the beneficiary; and if there is no definite beneficiary it cannot be enforced at all. In the leading case of *Morice v. Bishop of Durham*,⁵⁵ a testatrix bequeathed all her estate to the Bishop of Durham upon trust to pay her debts and certain legacies and "to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of." It was held that although the bishop was ready and willing to carry out the wishes of the testatrix, he should not be allowed to do so and that the next of kin were immediately and unconditionally entitled to the residue. The scope of the purpose of the testatrix was too broad to be held charitable. Hence the purpose of the testatrix could not be enforced by the attorney general. And no one else had a standing to enforce it. What, then, should be done with the property? Conceivably the bishop might be allowed to keep it. But equity sternly repels the claim of any one to keep property to which it was intended that he should take only the legal and not the beneficial title. The question then arises whether the bishop should be allowed to perform if he is willing to do so. There is nothing illogical in allowing him to perform, although he cannot be compelled to do so; there is nothing unreasonable in holding that there is not an immediate and unconditional resulting trust for the next of kin, but that there is a resulting trust for them subject to a condition precedent of the failure of the bishop to perform. There would be no practical difficulty in dealing with the situation; it would be perfectly possible for a court of equity at the suit of the next of kin to decree that the bishop should hand over the property to the next of kin unless within a reasonable time he should carry out the purpose of the testatrix. Thus to dispose of the matter would certainly more nearly accomplish the intention of the testatrix than to compel the trustee to hand over the property to the next of kin regardless of his willingness to per-

⁵⁵ 10 Ves. 521.

form. This was the earnest contention of Professor Ames,⁵⁶ but the authorities are all against him.

There are other cases similar to *Morice v. Bishop of Durham* in that there is no one who can enforce the purpose of the testator, but different in one respect, namely, that that purpose is definite. Such, for example, are bequests for the saying of masses for the soul of the testator or of other designated persons, where such bequests are not regarded on the one hand as charitable,⁵⁷ nor on the other hand as illegal,⁵⁸ which have sometimes been upheld.⁵⁹ Such also are bequests for the erection or care of a tomb or monument, which have sometimes been upheld.⁶⁰ Such also were bequests of slaves with a direction for their emancipation, where such bequests were not enforceable by the slave, nor charitable nor illegal, which were sometimes upheld.⁶¹ Such also are bequests for the care of certain definite animals, which have been upheld.⁶²

⁵⁶ The Failure of the Tilden Trust, 5 Harv. L. Rev. 389.

⁵⁷ As in *O'Hanlon v. Logue* (1906), 1 I. R. 247; *Hoeffer v. Clogan*, 171 Ill. 462; *Gilmore v. Lee*, 237 Ill. 402; *Ackerman v. Fichter*, 179 Ind. 401 (all poor souls); *Schouler, Petitioner*, 134 Mass. 426; *Webster v. Sughray*, 69 N. H. 380; *Kerrigan v. Tabb*, 39 Atl. 701 (N. J.); *Seibert's Appeal*, 18 W. N. (Pa.) 276.

⁵⁸ As in England. *West v. Shuttleworth*, 2 Myl. & K. 684. See *post n.* 102.

⁵⁹ *Reichenbach v. Quin*, 21 L. R. Ir. 138; *In re Lemmon's Estate*, 152 Cal. 377; *Moran v. Moran*, 104 Iowa 216; *Coleman v. O'Leary's Exr.*, 114 Ky. 388; *Sherman v. Baker*, 20 R. I. 446; *Re Zeagman*, 37 Ont. L. Rep. 536. The opposite result was reached in *Festorazzi v. St. Joseph's Catholic Church of Mobile*, 104 Ala. 327; *Holland v. Alcock*, 108 N. Y. 312; *McHugh v. McCole*, 97 Wis. 166, 181. See a collection of cases in 14 L. R. A. (N. S.) 96.

⁶⁰ *Mussett v. Bingle* (1876), W. N. 170; Ames, Cases on Trusts (2d Ed.), 201, n. 2. The opposite result was reached in *McCaig v. University of Glasgow* (1907), S. C. 231. See a collection of cases in 1 British Ruling Cases, 931. If the bequest is for the erection of a monument to the testator himself it may be regarded as a funeral expense; and if of a monument in a church or churchyard or for a public character, it may be regarded as a charitable trust. *In re Barker*, 25 T. L. R. 753. Some states have statutes upholding bequests for the erection or maintenance of monuments, and for the care of burial lots. See for example, *Hurd's Rev. Stat. Ill.* (1915-1916), c. 21, Sec. 5½; *Mass. R. L.* (1902), c. 78, Sec. 24, c. 113, Sec. 42; *N. Y. Consol. Laws* (1909), Personal Property Law, Sec. 13a; *Ohio Gen. Code* (1910), Sec. 10,110.

⁶¹ *Ross v. Duncan, Freem. Ch. (Miss.)* 587; Ames, Cases on Trusts (2d Ed.), 213 n.

⁶² *In re Dean*, 41 Ch. D. 552. A bequest for the care of an indefinite

Are such dispositions invalid? Are they for any reason against public policy? Professor Gray argued⁶³ that in all these cases the testator is attempting to "create a legal duty without a legal right." That is true; the testator intends to impose an obligation on the legatee; and he fails in this because there is no one who has a right to enforce the obligation. But is there any objection to making the accomplishment of the testator's purpose depend on the willingness of the legatee to perform? Professor Gray argued that the law will not allow a man "to create a situation where the legal title is in A and the beneficial interest in no one." But is this really the law? The testator could have accomplished the desired result by giving a power to appoint for the desired purpose; he could have accomplished nearly the same result by making a bequest conditional upon the fulfillment of the desired purpose.⁶⁴ There seems to be no reason, therefore, why attempted trusts for these purposes should be regarded as against public policy. One is always inclined to doubt the soundness of an argument that a disposition is against public policy when the same result accomplished in a different way is not against public policy. If they fail it is because of a purely technical rule which defeats the intention of the testator.

The case of *Morice v. Bishop of Durham* might be differentiated from the cases in which the gift is for a definite purpose, on the ground that the testator has no right to make a gift, the effect of which is practically to delegate to another the power to make his will for him after he is dead.⁶⁵ But there seems to

number of animals is charitable. *In re Wedgwood* (1915), 1 Ch. 113; Minns v. Billings, 183 Mass. 126.

⁶³ Gifts for a Non-Charitable Purpose, 15 Harv. L. Rev. 509.

⁶⁴ *In re Tyler* (1891), 3 Ch. 252.

⁶⁵ The Louisiana Code, Article 1573, provides that "The custom of willing by testament, by the intervention of a commissary or attorney in fact is abolished. Thus the institution of heir and all other testamentary dispositions committed to the choice of a third person are null, even should that choice have been limited to a number of persons designated by the testator." This article applies to bequests for charitable purposes. Succession of McCloskey, 52 La. Ann. 1122. In New Mexico, on the contrary, it is provided by statute (N. Mex. Stat. [1915], Sec. 5859), that "Any person capable of making a will may empower and authorize any other intelligent and well-qualified person to make his last will and testament and dispose of his property."

be nothing opposed to public policy in such a disposition. It is assumed even by those who support the case that if the testator had employed the machinery of an optional power of appointment in favor of any person in the world except the donee, it would be good.⁶⁶ And yet the creation of such a power would accomplish the same result as that which would follow from allowing the bishop to perform the attempted trust if he were willing.⁶⁷

There is one very important class of cases of non-charitable trusts in which there is no definite beneficiary, namely, trusts for unincorporated clubs and societies. Professor Gray felt logically driven to contend that such trusts should fail unless their creator intended to confer the entire beneficial interest upon the persons who are members of the club or society at the time of the creation of the trust.⁶⁸ But such a result seems peculiarly shocking. Professor Maitland in his lucid and entertaining way has shown how unincorporated associations, through the aid of the law of trusts, have won their place in the sun and grown and flourished.⁶⁹ Public policy has not been violated by their development. A more severe blow could not be struck against them than to deny them the right to enjoy at least a beneficial interest

⁶⁶ "The common law allows property to pass from one person to another on any future contingency (provided it is not too remote) and the contingency may be a nomination by a third person." Gray, 15 Harv. L. Rev. 512. But see *Norris v. Thomson*, 19 N. J. Eq. 307.

⁶⁷ Professor Ames's contention was in effect that a trust connotes duties and powers; and that if the duties fail for want of some one to enforce them, the trust fails as a trust, but the powers remain as optional powers. Professor Gray disapproved of this analysis. See Gray, Powers in Trust and Gifts Implied in Default of Appointment, 25 Harv. L. Rev. 1. Was not Professor Gray somewhat influenced by his desire to avoid the necessity of recognizing any time-rule except the rule against perpetuities?

⁶⁸ 15 Harv. L. Rev. 525; Rule against Perpetuities (3d Ed.), Sec. 897. Professor Gray suggests that if the trust is created by a conveyance *inter vivos*, it is possible to regard the transaction as a mandate, valid until revoked; and that in some cases it is possible to spell out a contract between the settlor and the trustees, or, if several persons contribute, a contract between the contributors. But he contends that an attempted trust by will for a non-charitable unincorporated society can be avoided by the heirs or next of kin of the testator.

⁶⁹ Maitland, Collected Papers, III, 271-284, 321-404. "The trust has given us a liberal substitute for a law about personified institutions. The trust has given us a liberal supplement for a necessarily meagre law of corporations." *Op. cit.* 279.

in property. Courts of law to a limited extent have recognized such associations, but equity has given them ample countenance. There is no difficulty in enforcing such trusts as these, for even though all the members of the association have no right to insist on a distribution of its property among them, yet any member should have a right to file a bill in equity to compel the trustees to carry out the trust. Such trusts, therefore, have sometimes been upheld.⁷⁰

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(*To be Continued*)

⁷⁰ *In re Drummond* (1914), 2 Ch. 90. See an article on The Legal Status of a College Fraternity Chapter, 42 Amer. L. Rev. 168, 180.